

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Jerry S. Berg,

vs.

Byron Independent School District

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on November 15, 2012, at the Dodge District Courthouse, 22 Sixth Street East, Mantorville, Minnesota. The OAH record closed on November 15, 2012, at the end of the hearing.

Patricia A. Maloney, Esq., Ratwik, Roszak & Maloney, P.A., Minneapolis, MN, appeared on behalf of the Respondent, Byron Independent School District (District); Petitioner, Jerry S. Berg, appeared on his own behalf without legal counsel.

STATEMENT OF THE ISSUE

Did the District violate the Petitioner's rights under the Veterans Preference Act, Minn. Stat. § 197.46 (VPA)¹ in connection with his application for employment as a Transportation Manager for the District.

The Administrative Law Judge concludes that the District did not materially violate the Petitioner's veteran's preference rights in connection with his application for the position of Transportation Manager in May 2012. The ALJ, therefore, recommends that the Commissioner order the District to provide Petitioner the reason[s] he was not selected in writing, and dismiss the remainder of Petitioner's Petition.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

¹ Unless otherwise indicated, all references to Minnesota Statutes are to the 2012 edition.

FINDINGS OF FACT

Jurisdictional and Procedural Findings

1. The Petitioner is an honorably discharged veteran, having served on active duty in the U.S. Air Force from March 29, 1966, until January 15, 1970.²

2. The District is a political subdivision of the State of Minnesota.

3. On July 9, 2012, the Petitioner submitted a Petition for Relief Under the Minnesota Veterans Preference Act (Petition) to the Commissioner of the Department of Veterans' Affairs (Commissioner) alleging a violation of his VPA rights in May, 2012.

4. On July 12, 2012, the Commissioner issued a Notice of Petition and Order for Hearing, and this contested case proceeding ensued.

Petitioner's Military Service, Education, and Relevant Employment

5. Between 1963 and 1964 Petitioner was a Toolmaker apprentice at Professional Instruments Company in Rochester, MN, where he studied toolmaking and the manufacture of parts with machine tools.³

6. Between 1964 and March, 1966 Petitioner was a student in the Manufacturing Technology Program at International Business Machines (IBM) in Rochester, MN, leaving that program when he enlisted in the U.S. Air Force.⁴

7. During his service with the U. S. Air Force, the Petitioner was trained and served as an aircraft and automotive technician. He serviced aircraft equipment including AC and DC generators, hydraulic servicing systems, air conditioning systems, air compressors and reciprocating and turbine engines. Petitioner attended a Non-Commissioned Officer (NCO) Leadership School, studying leadership and management, together with communications and training principles. During his final year of enlistment, Petitioner managed and trained a six-person maintenance team and was named a "Safety Airman of the month."⁵

8. After being discharged from the Air Force, Petitioner became employed full-time by IBM and first completed the two-and-one-half-year-long Manufacturing Technology training program for maintenance and repair of industrial machining and assembly processes, graduating as a fully trained toolmaker. He also received training in machine design and drafting.⁶

9. Petitioner was a special equipment designer and project manager at IBM from 1981 to 1994, responsible for the design and coordination of the manufacture of

² Exhibit. 2, Report of Transfer or Discharge from Active Duty (DD Form 214N).

³ Ex. 4.

⁴ *Id.*

⁵ *Id.*; Ex. 2.

⁶ Ex. 4.

equipment, often managing several projects at once. Project management included training of the maintenance team, cost control, build coordination, parts ordering, and installation specifications. He was terminated from IBM in 1994 when the product line he was involved in was transferred outside the United States by the company.⁷

10. Between 1997 and 1998 Petitioner worked for a company that had a one-year contract with IBM to develop and design new products for IBM. During that time Petitioner received two patents for new IBM products.⁸

11. From 2001 to 2002, Petitioner worked as a Senior Mechanical Designer, developing and designing new products, for a company that went out of business in 2002.⁹

12. Between 2002 and March 2012, Petitioner was employed as a substitute bus driver for Kasson-Mantorville (K-M) Public Schools.¹⁰

13. Beginning March 8, 2012, to the present, Petitioner has been employed by the District as a full-time route bus driver.¹¹

14. Petitioner is and has been involved in the following youth activities for the periods indicated:

- a. 1983 – March 2010 – Official for football and basketball events, for the K-M Public Schools; and
- b. 1986 – 1987 – American Legion baseball coach; and
- c. 1980 – 1981 – Little League baseball coach; and
- d. 1971 – 1985 – Cub Scout and Boy Scout Leader, where he: organized meetings, events, and camping trips; and maintained records and finances.¹²

15. Between 1970 and 1972, Petitioner attended Rochester Community and Technical College, where he acquired 27 credit hours in math and science.¹³

District Personnel Practices

16. District personnel Policy 405, regarding Veteran's Preference Hiring (the VPA Policy) provides that "It is the school district's policy to comply with the VPA

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

regarding veterans and spouses of deceased veterans or disabled veterans.” Section II of the Policy also provides, in relevant part as follows:

C. Veteran preference points will be applied pursuant to applicable law as follows:

1. There shall be added to the competitive open examination rating of a non disabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.

...

F. The school district’s policy is to use a 100-point hiring system to enable allocation of veteran’s preference points. The school district may or may not use a 100 point hiring system for filling teaching positions. If a 100-point hiring system is not used for filling a teaching position, preference points will not be added, but all veteran applicants who have proper licensure for the teaching position will be granted an interview for the position.

...

G. If the school district rejects a member of the finalist pool who has claimed veteran’s preference, the school district shall notify the finalist in writing of the reasons for the rejection and file the notice with the school district’s personnel officer.¹⁴

17. In addition, the VPA Policy provides a form containing the 100-point rating system that is utilized by its evaluators in determining which candidates meet the minimum qualifications for a District position of employment. The combined rating of all evaluators is utilized to determine rankings of all applicants. The evaluators for a position establish a “minimum qualifications” score to determine which candidates will and will not receive interviews. The VPA 100-point scoring sheet provides in relevant part as follows:

The Byron School district has an approved 100 point based rating system. If a veteran applies for any opening in our school district, the 100 point system will be used.

Byron School District

100 Point Application Scoring System

Points awarded are based on the information provided on the application.

Application complete: (25 points) _____

¹⁴ Ex. D.

Experience as relates to Job Description: (25 points) _____
Education as Relates to Job Description: (20 points) _____
References: (20 points) _____
Veteran's Preference Points (10 points) _____

Veterans Points are only awarded to veterans with a "minimum Qualification" passing score

Veteran's Preference points if candidate is a veteran and has provided proof with copy of DD214 with the application (5 points)

. . .¹⁵

18. The District followed the foregoing VPA Policy throughout the hiring process for Transportation Manager in April and May of 2012. Principal responsibility for the hiring process rested with the outgoing District Superintendent, Wendy Shannon, and the incoming District Superintendent, Jeffrey Elstad, who was hired April 1, 2012.¹⁶

The Transportation Manager Position

19. In the Spring of 2012 the District School Board delegated the authority to the Superintendents to develop new job descriptions for District positions of employment to update them to current actual practice and future desired practices, and develop a certain uniformity among job descriptions.¹⁷ One of the positions revised was the position described as Transportation Director, because the job description was out-of-date when compared to actual practice.¹⁸

20. The foot of the job descriptions for both the former Transportation Director position and the current Transportation Manager position states:

This organization reserves the right to revise or change job duties and responsibilities as the need arises. This job description does not constitute a written or implied contract of employment.

21. There are three material differences in the required, minimum qualifications between the former Transportation Director (Director) position and the current Transportation Manager (Manager) position.

- First, the Manager position requires a high school diploma. The Director position required "High School diploma or equivalent."
- Second, the Manager position requires "2 year post-secondary training." The director position required "2 year vocational training."

¹⁵ *Id.*; Testimony (Test.) of Matthew Prigge, District School Board Chairman, and Jeffrey Elstad, District Superintendent of Schools.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; Ex. C.

- Third, the Director position required “1-2 years of mechanical experience” and the Manager position does not. The Manager position states that “Mechanical experience preferred” but not required.¹⁹

22. Both the Manager and Director positions report to the District Superintendent and list the same Job Goal, which is:

Responsible for the organization, administration, supervision in the area of the school district transportation system in accordance with state law and policies along with school district policies. To perform general maintenance on all school vehicles and review bids for vehicle purchases.

23. The Transportation Manager job description lists the following Performance Responsibilities:

1. Prepare bus routes and route maps for drivers for regular school year and summer school.
2. Trains all drivers, recruits, interviews, checks background and recommends for employment bus drivers and substitute drivers.
3. Perform general maintenance on all school vehicles.
4. Performs yearly driver evaluations.
5. Certify drivers' training.
6. Responsible for district completing school bus safety course for all students on a yearly basis.
7. Prepare and submit all necessary bus transportation oriented reports and records including driver checklist and ensure their submission on a timely basis.
8. Mileage reports for all district owned vehicles submitted monthly and business office with any outside billings clearly marked.
9. Keep accurate bus lists for transported students detailing their type of transportation, i.e. Special education, 1-2 mile, etc.
10. Work with Superintendent on driver performance issues.
11. Check roads during the winter to insure safe driving conditions.
12. Hold a CDL (Commercial Driver's License) for driving a bus in an emergency or for repair.
13. Communicates district policy to drivers.
14. Assign drivers for field trips and extracurricular activities.
15. Attend School board Meetings as directed by Superintendent.

¹⁹ Exs. B and C.

16. Arrange for substitute drivers as needed.
17. Attend District Management Team monthly meetings.
18. Employee is responsible to be knowledgeable about all district policy.
19. This job description is not intended to be all-inclusive, and employee will also perform other reasonable related business duties as assigned by immediate supervisor and other management as required.²⁰

24. The only differences between the Manager and Director position in the foregoing Performance Responsibilities are as follows:

- Items 12 and 17 are new to the Manager job description.
- Item 3 of the Manager job description deleted the ending phrase “and groundskeeping equipment.
- “Plow snow at bus garage during winter” was not included in the Manager job description²¹

The addition of item 12 to the Manager description, regarding driving buses for repair, and deletion of the duty of repairing groundskeeping equipment, were due to the fact that bus and groundskeeping repairs had been contracted out to third parties for some time and the current job description needed to reflect actual practice.²²

25. The Transportation Manager job description was developed and in place when the position was posted on April 23, 2012. It was ratified by the District School Board in June 2012.²³

26. A non-veteran female District Bus driver had been Acting Transportation Director for approximately one year prior to spring of 2012, due to illness of the individual performing that task for an outside vendor.²⁴

Process Utilized by the District in Filling the Transportation Manager Position

27. On April 23, 2012, the District published an invitation (posting) for applications for open competitive appointment to the position of Transportation Manager with the District website, the Rochester Post Bulletin, and the Byron Review. The on-line Posting stated:

²⁰ Ex. B.

²¹ *Id.*; Ex. C.

²² Test. of J. Elstad

²³ *Id.*; Ex. B.

²⁴ *Id.*; Test. of J. Berg; Ex. 22.

Transportation Manager

Apply Online

Category: **Transportation/Transportation Manager**

Date Posted: **4/23/2012**

Location: **Byron Transportation Department**

Date of Availability: **07/02/2012**

Date Closing: **05/04/2012**

The Transportation Manager is responsible for the organization, administration, supervision in the area of the school district transportation system in accordance with state law and policies along with school district policies. To schedule general maintenance on all school vehicles and review bids for vehicle purchases. Deadline for applications May 4, 2012.

Questions may be direct to:

Dr. Wendy Shannon, Superintendent

Byron School District

1887 2nd Avenue NW

Byron, MN 55920

507-775-2383

Byron Public Schools uses the AppliTrack system from ASP to manage employment applications online.²⁵

28. In addition, the outgoing District Superintendent circulated the following memorandum to all current District bus drivers, including Petitioner:

Memorandum

“Maximizing Learning Opportunities for All”

To: Byron School District Bus Van Drivers

From: Dr. Wendy S. Shannon, superintendent

Re: **Transportation Manager 2012-2013**

Date: April 23, 2012

Greetings! I have talked with each member of the Byron School board about our option to continue with outsourcing our transportation manager or having the Byron School District hire our own manager. The strong consensus has been to advertise the position and hire our own Byron employee. We are very appreciative of the services of Grisim

²⁵ Ex. B.

Transportation, but are at a crossroads with Mike's medical leave and the changing of school superintendents.

The plan is to advertise the transportation manager position for the next two weeks through May 4, 2012. The transportation manager will be an annual salaried position.

If you have any questions, please do not hesitate to contact me or if you might be interested in applying, please look at the job posting on the school district website at <http://www.bears.byron.k12.mn.us> Click on "District" and scroll down to 'Employment Opportunities'. You will find the application information under 'Transportation' on the left under categories.

WWS/db

29. The District utilized a team consisting of the following three individuals (the Team) to review and score the candidates' applications for the Manager position, establish a "minimum qualifications" score to determine which candidates would receive interviews, interview the qualified candidates utilizing a pre-selected set of questions to ask of the candidates, select three finalists, check with the finalist's references, and select the successful candidate:

Chair of the District School Board: Mr. Matthew Prigge

Outgoing District Superintendent: Dr. Wendy Shannon

Incoming District Superintendent: Mr. Jeffrey Elstad.²⁶

30. Petitioner considered the Acting Transportation Director unqualified for the position of Transportation Manager, primarily because of what he considered a lack of mechanical experience. He considered her the leading candidate for the position. During the two-week posting period, Petitioner met with Dr. Shannon and expressed his opinions about his co-worker.²⁷

31. On May 3, 2012, Petitioner confronted Dr. Shannon, and, in a contentious meeting, asked why she had previously directed the Acting Transportation Director to review all of the surveillance tapes from Petitioner's bus, and ride along with Petitioner on all of his bus routes.

32. The District received 10 applications for the Manager position at the close of the posting on May 4, 2012.²⁸

33. The Petitioner was one of the candidates that met the minimum qualifications for the position.²⁹ The Team established a combined score of 195 out of

²⁶ Exs. I - N; test. of J. Elstad, M. Prigge, and J. Berg.

²⁷ Test. of J. Berg.

²⁸ Test. of J. Elstad.

²⁹ *Id.*

300 possible points to determine which of the qualified candidates would receive interviews.³⁰ One of the five candidates that did not receive 195 points was also a veteran from out of the State of Minnesota. His application was incomplete, he did not permit the District to contact his current employer. He received a combined score of 165.³¹

34. Petitioner was one of five candidates that received a combined score of over 195 points.³² The other four qualified candidates were:

- The female District bus driver serving as the Acting Transportation Director.³³
- A male District bus driver, also a veteran that received five veterans' preference points.³⁴
- Another male District bus driver.³⁵
- A male school bus routing coordinator for First Student whose then current position required him to coordinate 132 bus routes for the Rochester, MN, public schools.³⁶

35. The Team then conducted 30-minute interviews all five candidates on May 16, 2012, rotating among the three of them the asking of the following 18 questions on the Structured Interview questionnaire:

1. Tell us about yourself. Include recent work experiences.
2. If we called three of your closest friends, how would they describe you in one word (three people – one word each)?
3. Could you share some strategies you may employ when dealing with a phone call from an angry parent?
4. What do you feel will be the toughest and most enjoyable aspects of this job?
5. Some of the most effective people work best when they work alone, while others function better when part of a group. Where would you place yourself on this continuum?
6. With regard to a large staff such as ours, how would you define the term “a team player”?

³⁰ *Id.*; Ex. G.

³¹ Test. of J. Elstad; Ex. N.

³² *Id.*

³³ Ex. K.

³⁴ Ex. L.

³⁵ Ex. J.

³⁶ Ex. I.

7. Have you had any moving violations in a vehicle in the past 5 years?
8. Do you have any traffic citations or criminal charges that could prevent you from getting your bus license?
9. Do you see yourself being a long term employee with the Byron School district?
10. How do you deal with being “fair” with regard to allocating extra-curricular trips between drivers?
11. Please outline your experiences with bus inspections.
12. Please address your philosophy on driver evaluations and the required student safety training.
13. Describe you timeline and process for scheduling route and extra-curricular buses.
14. Talk to us a little on the topic of bus discipline; the role of the district’s discipline philosophy, the role of the building principal, the role of the parent, the role of the bus driver, and the role of the transportation manager.
15. If a student throws up while in route to school, how would you handle this situation?
16. Why do you want to be the Transportation manager for the Byron School district?
17. How would you describe a good day as a quality Byron School’s Transportation manager?
18. Do you have any questions of us at this time?³⁷

Each member of the Team took notes and completed the Structured Interview Questionnaire.³⁸

36. After the interviews, the Team met together. Based on the applications, the interviews, the candidates’ answers to the interview questions, and comparing all skill sets with the job, the Team selected the following three candidates as the finalists – those whose references would be contacted:

³⁷ Test. of J. Elstad and M. Prigge; Exs. I – M.

³⁸ *Id.*

- The female District bus driver serving as the Acting Transportation Director.³⁹
- The non-veteran, male, District bus driver.⁴⁰
- The male school bus routing coordinator for First Student whose then current position required him to coordinate 132 bus routes for the Rochester, MN public schools.⁴¹

37. On May 17, Mr. Elstad conducted telephone reference checks of the finalists, utilizing a form titled Confidential telephone Reference Check containing 10 questions rating the candidates on a scale of 1 – 10, together with the following four additional questions:

- Would you highly recommend, recommend or recommend with reservation this person for employment?
- Please answer the following questions “Yes” or “No.” Do you know of any reason (moral or ethical) why this person should not be given the responsibility for the care of school children?
- Would you rehire this person?
- Do you have any additional comments?⁴²

38. After the references had been checked, the Team consulted with each other and unanimously selected the First Student route coordinator for the District Transportation Manager position. He was called at 10:20 a.m. on May 18, 2012 and offered the position, which he accepted.⁴³

39. Mr. Elstad called the other four qualified candidates, also on May 18, 2012, including Petitioner, and informed them that they had not been selected for the Transportation Manager position.⁴⁴

Other Findings

40. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

41. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

³⁹ Ex. K.

⁴⁰ Ex. J.

⁴¹ Ex. I.

⁴² Test. of J. Elstad; Exs. I at 15 and 16, J at 17 – 19.

⁴³ Test. of J. Elstad; Ex. I at 1.

⁴⁴ Test. of J. Elstad; Exs. J at 1, K at 1, L at 1, M at 1.

42. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction to consider this matter.⁴⁵

2. The Notices of Petition and Orders for Hearing were proper in all respects, and the Department of Veterans Affairs (DVA) has complied with all of the law's substantive and procedural requirements.

3. The DVA gave the Petitioner and the District proper and timely notice of the hearing in this matter.

4. The Petitioner is an honorably discharged, disabled "veteran" within the meaning of the VPA,⁴⁶ and he is entitled to all of the protections and benefits of that Act.

5. The VPA provides, in part, that:

The provisions of section 43A.11 granting preference to veterans in the state civil service shall also govern preference of a veteran under the civil service laws, charter provisions, ordinances, rules or regulations of a *District*, city, town, school district, or other municipality or political subdivision of this state . . . [Emphasis supplied.]

6. Minn. Sta. § 43A.11, subd. 1, in turn, provides that:

Recognizing that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily assessed by examination, a veteran's preference shall be available pursuant to this section to a veteran as defined in section 197.447.⁴⁷

7. Minn. Stat. § 197.455 (2010), provides in relevant part:

Subd. 4. **Nondisabled veteran's credit.** There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.

⁴⁵ Minn. Stat. §§ 14.50 and 197.481.

⁴⁶ Minn. Stat. §§ 197.447 and 197.455.

⁴⁷ See *also* Minn. Stat. § 197.455, subd. 2.

Subd. 10. **Rejection; explanation.** If the appointing authority rejects a certified eligible who has received veteran's preference, the appointing authority shall notify the eligible in writing of the reasons for the rejection and file the notice with the appropriate local personnel officer.

8. Minn. Stat. § 197.455, subd. 4 (2012), effective April 19, 2012, provides:

Subd. 4. **Nondisabled veteran's credit.** There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of ten points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.⁴⁸

9. Minn. Stat. § 43A.11, subd. 7, provides:

Subd. 7. **Ranking of veterans.** Applicants who meet the minimum qualifications for a vacant position and claim disabled veteran's preference shall be listed in the applicant pool ahead of all other applicants. Applicants who meet the minimum qualifications for a vacant position and claim nondisabled veteran's preference shall be listed in the applicant pool after those claiming disabled veteran's preference and ahead of nonveterans. Each recently separated veteran who meets minimum qualifications for a vacant position and has claimed a veterans or disabled veterans preference must be considered for the position. The top five recently separated veterans must be granted an interview for the position by the hiring authority.

10. By law the District must credit applicants for positions with any of the VPA's hiring preferences for which they may be eligible.

11. The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.⁴⁹ Because VPA does not address burden of proof in contested case proceedings initiated under that Act, the Petitioner has the burden of proof to establish by a preponderance of the evidence that the District denied him rights to which he was entitled under the VPA.

12. By law competitive open hiring examinations given by the District may consist of written examinations or reviewing applicants' qualifications and ranking applicants to determine who will receive oral interviews.⁵⁰

13. The "tests" that the District administered to applicants in connection with its April 2012, posting for the position of Transportation Manager were based on

⁴⁸ Minnesota Laws 2012, Chapter 192, section 5.

⁴⁹ Minn. R. 1400.7300, subp. 5.

⁵⁰ *Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990) (*Hall*); *McAfee v. Department of Revenue*, 514 N.W.2d 301, 303 (Minn.App. 1994) (*McAfee*). See also Part II-A of the Memorandum that follows.

evaluation of applicants' past training and experience through evaluation of their applications and oral interviews.

14. When a political subdivision employs an evaluative interview in a hiring process in which veterans are involved, it must use a 100-point rating system in determining which applicants will receive an interview.⁵¹

15. Receiving a veteran's preference credit does not provide absolute preference for veterans; veteran's preference credit may increase the chance that a veteran will receive an interview, but the hiring authority may hire any certified applicant.⁵²

16. The District's failure to allot ten points under its 100-point rating system to determine who would be interviewed in connection with the April 23, 2012, posting for the position of Transportation Manager violated the new amendment to the VPA.⁵³ However, allocation of an additional five points would have had no effect on whether or not Petitioner would receive an interview, because Petitioner still qualified for, and received, an interview.

17. By placing Petitioner on the interview list for the position of Transportation Manager and by giving him an interview, the District gave the Petitioner the veteran's preference rights to which he was entitled under Minn. Stat. § 197.455. The District did not violate the Petitioner's veteran's preference rights by failing to hire him for that position.⁵⁴

18. The District's failure to notify Petitioner in writing of the reasons that he was not hired violated Minn. Stat. § 197.455, subd. 10.

19. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

20. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATIONS

The Administrative Law Judge respectfully recommends that the Commissioner:

⁵¹ See Part II-B of the Memorandum that follows.

⁵² *McAfee, supra*, 514 N. W. 2d at 304.

⁵³ See discussion in Part II-C of the Memorandum that follows

⁵⁴ See discussion in Part II-D of the Memorandum that follows.

1. **Order** the District to notify Petitioner in writing of the reasons he was not hired for the position of Transportation Manager; and
2. Otherwise, **DISMISS** Petitioner's Petition for Relief.

Dated: December 18, 2012

s/M. Kevin Snell

M. KEVIN SNELL
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Larry W. Shellito, Commissioner, MN Department of Veterans Affairs, 206c Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155-2079, (651) 757-1555, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. The Petitioner was not materially denied his veteran's preference rights in May 2012.

The VPA in its current form does not guarantee that a public employer will hire an eligible veteran in preference over eligible non-veterans.⁵⁵ What, then, is the nature of the advantage or preference that the VPA does give to veterans who apply for governmental positions? The evidence established that the District did use a 100-point rating system when it filled the Transportation Manager position in May 2012. The question, then, is whether the District violated the Petitioner's veteran's preference rights in connection with that posting and hiring process for that position.

A. The District properly used an evaluative interview process in lieu of a written competitive in selecting an incumbent for the Transportation Manager position that was posted in May 2012.

Citing Minn. Stat. § 43A.11 and its predecessor statutes, the Minnesota Supreme Court in *Hall*, observed that the legislature had not defined the term "examination," and concluded that interviews were "an appropriate form of examination."⁵⁶ Citing *Hall*, in turn, the Minnesota Court of Appeals confirmed that general proposition in *McAfee*:

The court in *Hall v. City of Champlin* addressed the application of veteran's preference points to political subdivisions when a civil service system is not used. As part of that analysis, the court determined that an examination and an interview could be equated for purposes of a competitive open examination. [Citation omitted.] We agree an interview may serve as the equivalent of an exam ...⁵⁷

Accordingly, the District did not err in this case in substituting an evaluative interview process for a written examination in its hiring process to fill the Transportation Manager position. However, that still leaves open the question of whether the District's evaluative interview process properly incorporated a 100-point rating system. Substantial evidence in the record shows that it did.

B. When a political subdivision employs an evaluative interview in a hiring process in which veterans are involved, it must use a 100-point rating system in determining which applicants will receive an interview.

In *Hall*, the Minnesota Supreme Court unequivocally stated:

⁵⁵ *Hall, supra*, 463 N.W.2d at 504; *McAfee, supra*, 514 N.W.2d at 305 .

⁵⁶ *Hall, supra*, 463 N.W.2d at 504-05.

⁵⁷ 514 N.W.2d at 304. However, the court went on to note that in the state civil service system, a written exam may be required when specifically mandated by a statute or rule

A local appointing authority may administer any type of evaluation as long as it is based on criteria capable of being reduced to 100-point rating system. The 100-point rating system will apply to all positions except those specifically exempted from the veterans preference act by Minn. Stat. § 197.46.⁵⁸

The court has never reversed or modified that holding in the *Hall* decision. Although *McAfee* involved somewhat similar issues, the Court of Appeals never addressed the necessity of a 100-point rating system because it concluded that the position at issue was an unclassified position that was not covered by the VPA.

What remains to be considered is *when* a political subdivision must administer the 100-point rating system in an evaluative interview hiring process. The Minnesota Supreme Court did not directly address that question in *Hall*. However, the legislature has addressed that question in Minn. Stat. § 43A.11, subd. 7:

Subd. 7. **Ranking of veterans.** Applicants who meet the minimum qualifications for a vacant position and claim disabled veteran's preference shall be listed in the applicant pool ahead of all other applicants. Applicants who meet the minimum qualifications for a vacant position and claim nondisabled veteran's preference shall be listed in the applicant pool after those claiming disabled veteran's preference and ahead of nonveterans. Each recently separated veteran who meets minimum qualifications for a vacant position and has claimed a veterans or disabled veterans preference must be considered for the position. The top five recently separated veterans must be granted an interview for the position by the hiring authority.

In short, the legislature clearly contemplated that veteran's preference points were to be applied at the stage of a hiring process when a public employer determines which applicants will receive an interview. The court of appeals in *McAfee* confirmed that interpretation:

Finally, even if *McAfee* had received a veteran's preference credit, he still would not be entitled to the relief he seeks, that is, appointment to the Attorney I position. Section 43A.11 does not provide absolute preference for veterans; veteran's preference credit may *increase the chance that the veteran will receive an interview*, but the appointing authority may hire any certified applicant.⁵⁹ [Emphasis supplied.]

There is nothing in the language of that section that restricts its application to state employees, and the fact that Chapter 43A is coded "State Personnel Management" does not of itself limit the scope of Minn. Stat. § 43A.11. "The head notes printed in boldface type before sections and subdivisions in any edition of the Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not

⁵⁸ *Hall, supra*, 463 N.W.2d at 505.

⁵⁹ *McAfee, supra*, 514 N.W.2d at 305.

part of the statute.”⁶⁰ Moreover, in *Hall*, the Minnesota Supreme Court explicitly indicated that Minn. Stat. §§ 43A.11 and 197.445 must be read in *pari materia*:

The plain words of section 197.455 provide that section 43A.11 shall govern preference of a veteran under charter provisions, ordinances, and rules or regulations, as well as civil service laws, of the political subdivisions of this state.⁶¹

The Petitioner argues that the 100-point rating system must be administered in a way that gives a veteran a practical advantage over other eligible applicants. Under Minn. Stat. § 43A.11, subd. 7, that practical advantage is an increased “chance that the veteran will receive an interview.” During the April-May 2012 hiring process, the Petitioner received five points less than he should have when the District determined which candidates would receive interviews. That error did not result in any disadvantage for the Petitioner. He still scored high enough to merit an interview. The final result was the same as the final result in *McAfee*:

Because the Department of Revenue granted McAfee an interview, he was accorded the same rights he would have received had section 43A.11 applied to this position.⁶²

In summary, even though the District erred in its use of the 100-point rating system in determining which applicants would be interviewed for the April 2012 job posting, it gave the Petitioner all rights to which he was entitled by being selected among the five finalists for interviews.

II. What, if any, relief is appropriate?

Petitioner argues that the evaluative process lacked some type of required objectivity, although he does not specify what is lacking. Substantial evidence in the record reflects an objective process to the maximum extent possible without a written test alone to determine who would be hired. This is evidenced by use of: the VPA 100 point system, predetermined questions for the oral interview, predetermined questions for reference checks, and a deliberative process by a team of three individuals.

Petitioner mistakenly argues that the Transportation Director job description controls what the minimum qualifications are for the Transportation Manager position. The only evidence in the record to support this argument is the fact that the written job description for Transportation Manager was formally approved by the District School Board in June 2012, after the Transportation Manager position had been filled. Petitioner argues that the successful candidate was improperly scored initially and should not have received an interview because of a lack of mechanical experience similar to Petitioner’s. All of the remainder of the evidence in the record reflects that, at every stage in the process, the Transportation Manager job duties, which do not “require” mechanical experience, are those that were selected by the Superintendents,

⁶⁰ Minn. Stat. § 645.49.

⁶¹ *Hall, supra*, 463 N.W. 2d at 504.

⁶² *McAfee, supra*, 514 N.W.2d at 305.

referred to in every document and posting, and utilized through the entire evaluative process, are those described in the Transportation Manager job description. Petitioner's argument is without merit.

The VPA does not guarantee that a public employer will hire a veteran in preference over non-veterans; it does not even require that a veteran receive an interview. Rather, it only requires that the veteran receive an increased opportunity for an interview when the veteran meets the minimum qualifications for the position and examination is an experiential examination based on interviews of the applicants.⁶³ Here, Petitioner met the minimum qualifications for the position of Transportation Manager when that position was posted on April 23, 2012. In that posting the District used a qualified 100-point rating system to determine who would be interviewed. The fact that the District erred in allotting five points rather than 10 is irrelevant in this case. Adding five points does not change the fact that Petitioner qualified for an interview without those points. Minn. Stat. § 197.481, subd. 1, empowers the Commissioner "to grant the veteran such relief the commissioner finds justified by said statutes." In the Petition under consideration, the Petitioner requested the Commissioner to direct the District to dismiss the successful candidate and "be required to reevaluate all the initial candidates" and, alternatively, to award Petitioner "a financial compensation settlement for loss of past and future salary and benefits" However, Minnesota's appellate courts have ruled that such relief is not available to the Petitioner. What he was entitled to by law was simply an increased chance for an interview – which he received.

Petitioner was also denied his right to receive "written" notice of the reasons he was not hired for the position of Transportation Manager. The ALJ respectfully recommends that the Commissioner order the District to comply with Minn. Stat. § 197.455, subd. 10, by sending Petitioner a written notice that contains the reasons that he was not selected. Such a remedy is adequate to remedy this violation of the VPA.

IV. Conclusion

The VPA requires political subdivisions to fill positions in the classified service by open competitive examinations. Those examinations may consist of written examinations or reviewing applicants' qualifications and informally ranking them after oral interviews. However, when the examination consists of oral interviews, the political subdivision must use criteria capable of being reduced to a 100-point rating system in selecting the applicants who will be interviewed. The current VPA requires that nondisabled veterans be given ten additional preference points in that 100-point rating system in order to increase their chances for an interview. The District's current policy and rating system gives veterans the preference required by the VPA.

Petitioner contends that the District's selection of the three final candidates was unfair, subjective, and inaccurate. He argues that he is the most qualified candidate for the position if all factors are weighed objectively. These arguments overstate the

⁶³ *Id.*

District's legal obligation. As long as the County has implemented a 100-point system, appropriately ranked candidates, and awarded veterans preference points, the County is legally entitled to make a hiring decision based on its subjective determination as to which of the candidates interviewed is the best fit for the job.

A preponderance of the evidence shows that the District utilized a 100-point system, Petitioner received sufficient preference points to rank him high enough on the list of eligible candidates to receive an interview, and he received an interview. There is nothing in the Veterans Preference Act that required the District to hire him instead of another qualified candidate.

The District gave the Petitioner an interview in connection with its April 2012 posting for the position. The District therefore did not materially violate the VPA or its own rules in connection with the evaluation and award of position. The ALJ therefore recommends that the Commissioner give the Petitioner no further relief beyond ordering the District to provide Petitioner, in writing, the reason[s] he was not selected.

M. K. S.